

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

REBA BAITES,

Plaintiff,

v.

NO. 2:95CV175-S-B

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY AND
NATIONWIDE MUTUAL INSURANCE
COMPANY,

Defendants.

OPINION

This case was originally filed in the Circuit Court of Desoto County, Mississippi. Plaintiff is a Mississippi resident who was involved in an automobile accident with an uninsured/underinsured motorist. She brought this action alleging that she was insured and was hence owed coverage under the policies issued to her by defendants, State Farm Mutual Automobile Insurance Company and Nationwide Mutual Insurance Company, both nonresident corporations. Nationwide filed a timely removal petition, and the action is now before the court upon plaintiff's motion to remand.

Section 1446(b) of the Judicial Code requires a defendant to file a petition for removal within thirty days after service of summons. Getty Oil Corp., a Div. of Texaco, Inc. v. Insurance Company of North America, 841 F.2d 1254, 1262 (5th Cir. 1988). Although Nationwide filed its removal petition within this period, the rule further requires all defendants who are joined and served

to join in the petition. Id. If a served defendant does not actually sign the original petition for removal, then the petition must set forth a reason, such as lack of service, explaining why the defendant did not formally join in the motion. See Wade v. Fireman's Fund Ins. Co., 716 F.Supp. 226, 230 (M.D.La. 1989); Courtney v. Benedetto, 627 F.Supp. 523, 526 (M.D.La. 1986). In such an instance, there additionally must be some written indication, filed in the record within thirty days of service on the first defendant, that the absent defendant actually has consented to removal. Getty Oil, 841 F.2d at 1262 n.11; Wade, 716 F.Supp. at 230. In the case sub judice, the record clearly demonstrates that State Farm did not join in the petition within the thirty day limit. Furthermore, the petition did not explain State Farm's absence, nor did State Farm timely supplement the record regarding its consent to the action's removal. Thus the petition was both facially and procedurally defective.

Subsequent to plaintiff's motion to remand the instant action, State Farm attempted to remedy the procedural defect by filing a motion to join in the removal petition. Although a defendant may freely amend a notice of removal within the thirty days following service of process, a procedurally defective petition may not be amended following the expiration of this period. See Marshall v. Skydive America South, 903 F.Supp. 1067, 1070-71 (W.D.Tex 1995); Wormley v. Southern Pacific Trans. Co., 863 F.Supp. 382, 385 (E.D.Tex. 1994). Because State Farm filed its motion to amend the

petition approximately one month after the thirty day period had run, the court holds that State Farm's attempt to cure the defect was ineffective.

However, the court's inquiry is not ended merely by noting that the removal petition was defective as filed, and that State Farm did not manifest its consent to the petition within the thirty day limitations period. The U.S. Supreme Court has held that a plaintiff can waive its right to contest a procedurally defective petition by participating in the proceedings of the district court. In re Moore, 209 U.S. 490, 496, 28 S.Ct. 585, 586-87, 52 L.Ed. 904 (1908), overruled in part on other grounds, Ex parte Harding, 219 U.S. 363, 31 S.Ct. 324, 55 L.Ed. 252 (1911). Accordingly, a plaintiff's participation in discovery has been construed to constitute acquiescence in the federal court's jurisdiction. See Harris v. Edward Hyman Co., 664 F.2d 943, 945 (5th Cir. 1981).

The Fifth Circuit's interpretations of In re Moore have allowed the district courts broad discretion in deciding whether a plaintiff has waived her right to object to procedural irregularities in removal actions. See Getty Oil, 841 F.2d at 1263; Harris, 664 F.2d at 945. The determining factor is the extent of the plaintiff's conduct in the federal proceedings. See Id.; Fontenot v. Global Marine, Inc., 703 F.2d 867, 870-71 (5th Cir. 1983). The instant action is distinguishable upon two grounds from those cases in which the courts found that the plaintiffs had waived their right to object. First, Mrs. Baites filed her motion

to remand within the allotted thirty day period.¹ See 28 U.S.C. § 1447(c). Secondly, although Mrs. Baites did take part in discovery, the court finds that her level of participation in the federal court was so limited that it cannot be considered as anything more than de minimis.² Cf. Harris, 664 F.2d at 945 (holding that plaintiff had waived right to seek remand by serving requests for admissions, request for production of documents, and set of interrogatories, and further complied with defendant's discovery requests, while giving no indication she was dissatisfied with federal forum).

Lastly, Nationwide contests the instant motion to remand by asserting that the plaintiff's claims are separate and independent as they relate to each defendant. Nationwide cites the court to the premise that when removal by one defendant is founded upon a claim that is separate and independent from claims brought against the other defendant, consent of the other defendant is not required. Henry v. Independent American Savings Assoc., 857 F.2d

¹Although plaintiff did not receive the benefit of an additional three days for service by mail, see Pavone v. Mississippi Riverboat Amusement Corp., 52 F.3d 560, 566-67 (5th Cir. 1995), the due date for her motion to remand fortuitously fell on a Saturday. See Fed. R. Civ. Pro. 6(e). Therefore, the motion was timely as it was filed on Monday, January 8.

²Prior to filing her motion to remand, Mrs. Baites submitted her core discovery disclosures and filed one request for admissions. Given the stringent discovery rules adopted in this district regarding mandated disclosure and various time limitations, the failure to at least begin the discovery process in certain circumstances may indeed be improvident. See Civil Justice Expense and Delay Reduction Plan for the U.S. District Courts for the Northern and Southern Districts of Mississippi.

995, 999 (5th Cir. 1988); see 28 U.S.C. § 1441(c). However, while defendant's reading of the rule is true in a broad sense, the applicable statutory language is considerably more restrictive in scope. Assuming the claims are separate and independent, § 1441(c) further requires that one of the claims also be nonremovable. Id.; Rembrandt, Inc. v. Phillips Const. Co. Inc., 500 F.Supp. 766, 769 (S.D.Ga. 1980). Thus, it is well settled that the principle does not apply when its assertion is merely grounded in the defendants' failure to comply with the statutory requirement that all defendants file their petitions for removal within thirty days of service of process. Van Slambrouck v. Employers Mut. Liability Ins. Co., 354 F.Supp. 366 (Mich. 1973); see Lady's Island Builders, Inc. v. Eighth Beaufort MCAAS Quarters, Inc., 175 F.Supp. 186, 188 (E.D.S.C. 1959) (holding that all non-resident necessary parties must join, even if claims are separate and independent). Therefore, the application of § 1441(c) would be improper in this context.

For the above cited reasons, the court finds that plaintiff's objection to State Farm's untimely consent to the defective removal petition is well taken, and that remand to state court is thereby warranted.

An ORDER in accordance with this opinion shall be issued.

This the _____ day of February, 1996.

CHIEF JUDGE

